MT LEGISLATIVE HISTORY

Chapter 575 1985

Bill (H) 778 S _____ Original bill & hist. ___C

H. Committee on State Administration			S. Committee on Judiciary		
Hearing Date(s)	Feb 19	✓C	Hearing Date(s)	Mar 18	✓C
	_____	___C		Mar 22	✓C
	_____	___C		Mar 28	✓C
	_____	___C		_____	___C
Date Out	Feb 19	✓C		Mar 28	✓C

Did this bill originate in an interim committee? ___Yes ___No

Committee _____ Report _____

HOUSE BILL NO. 778

INTRODUCED BY SPAETH, C. SMITH, JONES, PETERSON, LORY, WALLIN, NELSON, HARP, EUDAILY, ELLERD

IN THE HOUSE

February 11, 1985	Introduced and referred to Committee on State Administration.
February 20, 1985	Committee recommend bill do pass as amended. Report adopted.
	Bill printed and placed on members' desks.
February 22, 1985	Second reading, do pass.
	Considered correctly engrossed.
February 23, 1985	Third reading, passed.
	Transmitted to Senate.

IN THE SENATE

March 4, 1985	Introduced and referred to Committee on Labor and Employment Relations.
March 6, 1985	On motion, taken from Committee on Labor and Employment Relations and rereferred to Committee on Judiciary. Motion adopted.
March 28, 1985	Committee recommend bill be concurred in as amended. Report adopted.

March 29, 1985	On motion, rules temporarily suspended in order that all bills considered on second reading on the 70th Legislative Day advance to third reading that same day.
April 1, 1985	Second reading, concurred in as amended.
	Third reading, concurred in. Ayes, 41; Noes, 9.
	Returned to House with amendments.

IN THE HOUSE

April 2, 1985	Received from Senate.
April 8, 1985	Second reading, amendments concurred in.
	On motion, rules suspended and bill placed on third reading this day.
	Third reading, amendments concurred in.
	Sent to enrolling.
	Reported correctly enrolled.

HOUSE BILL NO. 778

INTRODUCED BY Smith C. Smith James Peterson Ly Emily Ellerd
McCann Nelson HARP

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE WORKERS' COMPENSATION ACT PROVISIONS RELATING TO THE AMOUNT OF ATTORNEY FEES, WHEN THEY MAY BE ASSESSED, AND THE ASSESSMENT METHOD; AMENDING SECTION 39-71-612, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 39-71-612, MCA, is amended to read:

"39-71-612. Costs and attorneys' fees ~~payable based on difference between amount paid by insurer and amount later found compensable~~ that may be assessed against an employer or insurer by workers' compensation judge. (1) If an employer or insurer pays or tenders payment of compensation under chapter 71 or 72 of this title, but controversy relates to the amount of compensation due, the case is brought before the workers' compensation judge for adjudication of the controversy, and the ~~settlement or~~ award granted by the judge is greater than the amount paid or tendered by the employer or insurer, a reasonable attorney's fee as established by ~~the division or~~ the workers' compensation judge if the case has gone to a hearing, ~~based solely upon the difference between the amount settled for or awarded and the amount tendered or paid,~~ may be awarded by the judge in addition to the amount of compensation.

(2) When an attorney's fee is awarded against an employer or insurer under this section there may be further assessed against the employer or insurer reasonable costs, fees, and mileage for necessary witnesses attending a hearing on the claimant's behalf. Both the necessity for the witness and the reasonableness of the fees must be approved by ~~the division or~~ the workers' compensation judge."

NEW SECTION. Section 2. Calculation of attorney fees. (1) The amount of an attorney's fee assessed against an employer or insurer under 39-71-611 or 39-71-612 must be based exclusively on the time spent by the attorney in representing the claimant on the issues brought before the workers' compensation judge. The attorney must document the time spent and give the documentation to the judge. The judge shall determine a reasonable attorney fee and assess costs. He is not bound by the documentation submitted to him. The hourly fee the judge applies to the time spent must be based on a customary and current hourly fee recognized by the legal profession as a reasonable hourly fee for legal work performed in this state.

(2) This section does not restrict a claimant and an attorney from entering into a contingency fee arrangement under which the attorney receives a percentage of the amount of compensation payments received by the claimant because of

the efforts of the attorney. However, an amount equal to any fee and costs assessed against an employer or insurer under 39-71-611 or 39-71-612 and this section must be deducted from the fee an attorney is entitled to from the claimant under a contingency fee arrangement.

NEW SECTION. Section 3. Extension of authority. Any existing authority of the division of workers' compensation to make rules on the subject of the provisions of this act is extended to the provisions of this act.

NEW SECTION. Section 4. Codification instruction. Section 2 is intended to be codified as an integral part of Title 39, chapter 71, and the provisions of Title 39, chapter 71, apply to section 2.

-End-

STATE OF MONTANA

REQUEST NO. FNN395-85

F I S C A L N O T E

Form BD-15

In compliance with a written request received February 13, 19 85, there is hereby submitted a Fiscal Note for H.B. 780 pursuant to Title 5, Chapter 4, Part 2 of the Montana Code Annotated (MCA). Background information used in developing this Fiscal Note is available from the Office of Budget and Program Planning, to members of the Legislature upon request.

DESCRIPTION OF PROPOSED LEGISLATION:

House Bill 780 would remove the requirement that when a member retires, the last five years of creditable service used in the calculation of benefits must be as a contributing member of the Teachers' Retirement System.

ASSUMPTIONS:

Salaries will increase 3.8% in Fiscal Year 1986 and 4.5% in Fiscal Year 1987. Approximately 1000 members will become eligible to purchase an average of 3 years of service, who were not eligible prior to the proposed legislation. Additional contribution of .15% would be required to fund the proposal. 10% of the approximate 300 who retire each year, would buy an average of 3 years of service. Benefits normally increase 10% per year.

FISCAL IMPACT:

On Retirement Fund Revenue	FY1986	FY1987
Employer Contributions		
Under Current Law	$24,261,097	$25,352,846
Under Proposed Law	24,758,251	25,872,372
Estimated Increase	$ 497,154	$ 519,526
Net Impact on Retirement Fund		
Revenue	$ 497,154	$ 519,526
Expenditures	26,250	52,500
Net Fund Increase	$ 470,904	$ 467,026

Expenditures	FY1986	FY1987
Annual Benefits		
Under Current Law	$34,837,367	$38,321,104
Under Proposed Law	34,863,617	38,373,604
	$ 26,250	$ 52,500

David L Hunter

BUDGET DIRECTOR
Office of Budget and Program Planning

Date: Feb 16, 1985

FN8:U/2

HB 780

THE COST TO THE STATE AND UNIVERSITY SYSTEM:

STATE AGENCIES	FY1986	FY1987
Under Current Law	$ 232,331	$ 242,786
Under Proposed Law	237,092	247,761
	$ 4,761	$ 4,975
General Fund	$ 2,904	$ 3,035
Other Funds	$ 1,857	$ 1,940
UNIVERSITY SYSTEM		
Under Current Law	$ 4,395,806	$ 4,593,617
Under Proposed Law	4,485,884	4,687,748
General Fund	$ 90,078	$ 94,131
Total Cost Increase to General Fund	$ 92,982	$ 96,071

LOCAL IMPACT:	FY1986	FY1987
Cost To Local Govern.		
Counties		
Under Current Law	$ 57,649	$ 60,243
Under Proposed Law	58,830	61,478
	$ 1,181	$ 1,235
School Districts		
Under Current Law	$19,575,311	$20,456,200
Under Proposed Law	19,976,445	20,875,385
	$ 401,134	$ 419,185

LONG-RANGE IMPACT:
Because of salary increases, for each additional 100 members over and above the 1000 members, an additional contribution of .022% would be required. This rate would be sufficient to amortize the additional liability over a 40 year period.

Costs for both state and local government will continue for the next 40 years and will increase as salaries increase.

Benefit increases will continue to increase as more members retire who will have purchased additional service under the proposed law.

(To be kept current -- post bills when entering being heard or leaving committee.) Form CS-32

STATUS SHEET

Forty-Ninth LEGISLATIVE SESSION

COMMITTEE ON State Administration

BILL NO.	ENTERED COMM.	DATE CONSIDERED	OUT OF COMM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMEND. DATE	BE CONCURRED IN DATE	BE CONC. IN AS AMENDED DATE	BE NOT CONCURRED IN DATE
HB 754	2/8, 2/23 3/6	2/19-3/6	2/19 3/6	2/19		3/6			
761	2/11	2/13	2/13			2/13			
762	2/11	TABLED							
771	2/11	2/14	2/14		2/14				
774	2/11	2/19	2/19			2/19			
775	2/11	2/19	2/19	2/19					
778	2/11	2/19	2/19			2/19			
780	2/11	2/21	2/21		2/21				
785	2/11	2/21	2/21	TABLED					
788	2/11	2/21	2/21	2/21					
792	2/12	2/15	2/15			2/15			
796	2/12	2/21	2/21	2/21					
806	2/12	2/21	2/21	2/21					
816	2/13	2/14	2/14	2/14					
814	2/13	2/21 & 2/22	TABLED	2/22					
823	2/14	3/6							

Use a separate sheet for Senate, House Bills, and Resolutions

In closing, Rep. Iverson said he was a licensed well driller, had been for several years and all he had seen of this Board was for them to come out and tell him that he needed to display his license on his truck - he didn't think that was protection of the State's ground water. He said he would have no trouble adjusting the bond and would work on the amount that would be acceptable.

The hearing was closed on HB 739.

CONSIDERATION OF HOUSE BILL NO. 775: Rep. John Harp, District #7, sponsor of the bill, said this was introduced at the request of the State Auditor because in the past they have overpaid some of the counties of forest reserve monies. Some of the counties have used this money and then have to pay it back. Some counties have to wait until the next year to make the payback. This bill is designed to clean up the bookeeping procedures on these monies if they could make the full payment at one time. It would make the auditor's office run a lot smoother and these counties would know what they are going to receive in forest receipt money.

PROPONENTS: Wayne Phillips, representing Andy Bennett, State Auditor, said that this was requested in 1981 by Lincoln County because the federal government makes these estimates and provides them to the State Auditor. In 1972 they estimated $8 million - when it came it was $4.5 million. The Auditor's office wants to receive the money and distribute it out by the end of the calendar year.

There were no further proponents.

There were no opponents.

There being no questions from the Committee, Rep. Harp closed his presentation.

CONSIDERATION OF HOUSE BILL NO. 762: Rep. Tom Jones, District #4, sponsor of the bill, said it came about because of the recent Supreme Court decision in the Willis workers' compensation case in which the attorney's fee alone exceeded the largest workers' compensation settlement in the state. No attorney is worth $1,000 per hour and the attorney's fee in the Willis case is a good example of this abuse.

PROPONENTS: Keith Olson, Executive Director of the Montana Logging Association, said that the Legislature must decide that workers' compensation exists for the protection of the employees. The current system encourages attorneys appealing the cases to a higher court. He suggested an hourly fee with a cap on the total fee for any one case. They were in support of the intention of the bill.

George Wood, Executive Secretary of the Montana Self Insurers' Association, said they supported HB 762 and more strongly support

HB 778. He suggested an amendment on line 15, page 1 by removing "shall" and inserting "may be required to". With that change he said they would support HB 762.

PROPONENTS: Karl Englund, attorney from Missoula and representing the Montana Trial Lawyers' Association, who represent most of the injured people and workers' compensation cases and said the Willis case must be distinguished from other cases in the state. The Willis award was the largest workers' compensation award ever in the state and this came about because of a Supreme Court decision. This is being considered in the Senate Labor Committee and told this Committee that an award of that magnitude will never be able to be made again because of the changes that will be made by this Legislature. He explained the Supreme Court decision concerning the fees set and said that most workers cannot afford an attorney on an hourly basis. This would put a cap on the contingency fee and allow payment on the value of the services rendered up to that cap. This is a very simplistic approach to a very complicated matter. He said that the governor has appointed a committee to study the entire workers' compensation system which is to come back to the 1987 Legislature with recommendations.

OPPONENTS: Don Judge, representing the Montana AFL-CIO, said he was not really an opponent but does not intend for workers' compensation to be an attorney's relief act. He said that Montana seems to have a top end in the contingency fee at 40% of the settlement if it goes to the Supreme Court. They did not think this bill answered the questions posed. He suggested that the Committee direct the problems to the Governor's committee appointed to study workers' compensation.

Ed Cummings, Missoula attorney, said that the only way for the workers' compensation system to work is for the injured worker to have access to legal counsel as the insurance companies do. Out of approximately 10,000 claims Willis has risen to the top because his attorney appealed a $60,000 settlement to the Supreme Court and was awarded $350,000 and collected a substantial fee. He said most attorneys take workers' compensation cases every day and don't collect anything on some of them and little on the majority of them. He asked that the Committee not to deny the working man access to reasonable legal counsel.

William Palmer, Department of Labor and Industry, said the bill should be amended to extend the authority to the workers' compensation court to promulgate rules.

John Hoyt, attorney from Great Falls, referring to page 2, lines 4 and 5, asked how you define "value of services rendered"? There are many different kinds of services provided by an attorney. He said that this bill is aimed at the lump sum and said the 20% will not inure to the benefit of anyone. A 25% fee is charged if a settlement is reached, one-third if tried in workers' compensation court and 40% if appealed to the Supreme Court. The escalation clause is an inducement to the insurer to settle the claim.

Chairman Sales told the Committee and those present that he was going to ask Rep. Spaeth to present his bill, HB 778, along with HB 762, as they both covered the same subject, attorneys' fees in workers' compensation cases. Then questions could be asked on both bills at the same time.

CONSIDERATION OF HOUSE BILL NO. 778: Rep. Gary Spaeth, District #84, said the bill is directed at assessing the contingency fee against the employer or insurer. These fees are very necessary in the legal profession but should not be assessed on the injured party.

PROPONENTS: Norm Grosfield, attorney in Helena and former administrator of the workers' compensation division, said 90% of his practice deals with the injured workers. He was opposed to HB 762 and said that HB 778 should be passed. He said that prior to 1973 the claimant had to pay all attorney's fees but this has changed. The Court would decide the fee upon the hours spent. In 1983 the Supreme Court directed that the fee should be based on the contingency fee and not on the hours. The system is good but it has to be cost effective. This would not take away the contingency fee but goes back to the prior system. There can still be a contingency agreement between the worker and the attorney but any payments made by the insurer toward the attorney fee would be deducted from that contingency fee. He suggested an amendment on page 3, line 7 following "compensation", insert "court".

Jim Davis, workers' compensation specialists, commended Mr. Grosfield for his stand on HB 778. He said there is a total of about $70 million claims in the state of Montana right now and wasn't sure if his company belongs in Montana. He said they are probably the only private carrier soliciting workers' compensation business. He said the Waite and Willis decisions are perhaps telling them they should not be in the state but also said they can't wait for two years for the governor's committee to report to the next Legislature.

OPPONENTS: Karl Englund, Montana Trial Lawyers' Association, said they wanted to make sure that this bill does not affect an agreement between the lawyer and the injured worker. He said this is a fundamental change in the way they do business in workers' compensation law and needs to be looked at more closely.

Ed Cummings, Missoula attorney, said there are two systems for compensating attorneys - hourly and the contingency system. This bill seeks to take the fees out of the contingency fee system and put it into the hourly fee system. The attorney for the insurer is getting paid win or lose. The claimant's attorney may get paid at settlement on appeal. If it is going to be changed, make it the same on both sides.

Don Judge, AFL-CIO, said the bill is changing the method of paying the attorney and he didn't think it was right to have it taken from the claimant's settlement.

DISCUSSION OF HOUSE BILLS NOS. 772 and 778: Rep. Smith asked Mr. Englund to state the contingency rates again for the Committee. Mr. Englund said they are 25% if settled, 30% if the case goes to trial before the workers' compensation court and 40% if the case goes to the Supreme Court. Rep. Smith asked if the attorney's work consists of 2 or 3 letters and the case is settled, do they still collect the 25%. Mr. Englund said that would be so if that is the contingency fee agreed upon.

Rep. Smith asked Mr. Englund if, after the Waite and Willis cases, there was an increase in claims. Mr. Englund said he didn't know but Rep. Smith said there was an increase of 12-27%. Rep. Smith stated that the Willis settlement was $350,000 and asked Mr. Englund what the attorney received in that settlement. Mr. Englund said he didn't know but that the attorney had said that the contingency fee provided for in that case was 40% of the settlement. In response to a question from Mr. Smith to Mr. Englund, Mr. Englund said he did not think that was a terrible burden to place on the employers of the state.

There being no further questions, Rep. Jones closed without further comment.

Rep. Spaeth, in closing, said the contingency fees are important and wanted to emphasize the good points of the bill. He asked that the system be reverted to what it was prior to the Waite decision about 1 1/2 years ago.

The time being 10:00 a.m. the Committee adjourned to go into floor session. The Committee will meet again at 7:00 P.M. on this day to hear the remaining bill, HB 747, and for executive action on the above bills.

WALTER R. SALES, Chairman

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STANDING COMMITTEE REPORT

February 19 83
19

SPEAKER

MR. .....

STATE ADMINISTRATION

We, your committee on .....

HOUSE 773

having had under consideration ..... Bill No. .....

First White

_____ reading copy (_____)
color

REVISE ATTORNEY FEE PROVISIONS OF WORKERS' COMPENSATION ACT

HOUSE 773

Respectfully report as follows: That ..... Bill No. .....

BE AMENDED AS FOLLOWS:

1) Title, line 7.
Following: "MCA"
Insert: "; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE"

2) Page 3, line 7.
Strike: "division of"
Insert: "office of the"
Following: "compensation"
Insert: "judge"

3) Page 3.
Following: line 13
Insert: "NEW SECTION. Section 5. Effective date. This act is effective on passage and approval."

AND AS AMENDED

DO PASS

Walter R. Sales
Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

CHAIRMAN--MAZUREK, JOE
NORMAL SCHEDULE==> SITE: OLD SUPREME COURT ROOM DAYS: M-TU-W-TH-F TIME: 10:00 A.M.-12 NOON

SECRETARY-STALEY, CINDY

BILL NO	REFER DATE	HEARING DATE	CONSIDERATION DATES	COMMITTEE ACTION	REREFERRED TO COMM	DATE OUT
HB0681	2/15	3/15		CONCUR AS AMENDED		3/19
BROWN, JAN			ALLOW RELEASE OF CONFIDENTIAL HEALTH INFORMATION TO MEDIA & LAW ENFORCEMENT			
HB0700	2/22	3/15	3/20 3/26	CONCUR AS AMENDED		3/28
MERCER, JOHN A.			REGULATE PLEA BARGAINS; REQUIRE GOOD CAUSE BE SHOWN FOR DISMISSAL			
HB0706	2/22	3/15		CONCUR AS AMENDED		3/15
MERCER, JOHN A.			CLARIFY THE ARSON LAW			
HB0712	3/04	3/18		TABLED		3/20
MILLER, RON			CREATING LIEN FOR FERTILIZER AND CHEMICAL APPLICATORS			
HB0713	2/22	3/19		CONCUR		3/19
WALLIN, NORM			INCLUDE VOLUNTEER FIREFIGHTERS IN GOOD SAMARITAN LAW LIMITING LIABILITY			
HB0714	3/05	3/19		CONCUR		3/23
SPAETH, GARY			CLARIFY DEFINITION OF "CLAIM" UNDER MONTANA'S TORT CLAIMS LAW			
HB0717	3/04	3/11		CONCUR AS AMENDED		3/26
WALDRON, STEVE			AWARD JOINT CUSTODY, ONLY WHEN BOTH PARENTS REQUEST			
HB0722	3/04	3/21		ADVERSE REPORT		3/23
NISBET, GERALD D.		(JERRY)	IMMUNITY OF TELEVISION BROADCASTER OR CABLECASTER FROM LIBEL			
HB0726	3/04	3/11		ADVERSE REPORT		3/13
GOULD, R. BUDD			PROBATIONARY LICENSE; 1ST REFUSAL TO TAKE BREATH TEST; PENALTY FOR VIOLATION			
HB0760	3/05	3/26	3/22--Tabled	CONCUR		3/26
NATHE, DENNIS G.			DISSOLUTION DECREE MAY NOT BE ENTERED UNTIL 90 DAYS AFTER FILING AND SERVICE			
HB0778	3/06	3/18 3/22		CONCUR AS AMENDED		3/28
SPAETH, GARY			REVISE ATTORNEY FEE PROVISIONS OF WORKERS' COMPENSATION ACT			

Elroy Letcher, Executive Secretary of the Montana Council of Co-operatives, opposes this bill. Mr. Letcher entered written testimony attached hereto marked Exhibit 5.

Bob Reiquam, President of First Banks, Great Falls, opposes this bill. Mr. Reiquam entered written testimony attached hereto marked Exhibit 6.

QUESTIONS OF THE COMMITTEE: Senator Crippen asked if there were any farmers out there that aren't bankers or seed dealers, just a plain old farmer? No-one answered so he couldn't ask his question. Senator Towe apologized for missing the proponent's testimony and asked what was the matter with the lien they already had in 71-3-901. Ms. Schraudner asked if that was the one that listed crop dusters. Senator Towe replied that it was. Ms. Schraudner felt that this only applies to the person who applies the chemical, but not to the person who supplies it, and it does not apply to fertilizers. Senator Mazurek asked if they were repealing all of the laws related to crop dusting. Ms. Schraudner replied that they are repealing the lien laws that cover crop dusting because this would include the crop dusting people.

CLOSING STATEMENT: Representative Miller felt that the banks are businesses and they should be treated like the rest of the businesses. He said they should get in line just like the rest of the suppliers. Representative Miller said that in Washington state only 2-3% of the farms had liens filed against them. He said there would not be a great number of liens filed. Representative Miller mentioned that the co-sponsors on the bill were mostly farmers, and mentioned that no farmers had opposed this bill. He said that banks come in second or third on many types of liens, and he doesn't understand why it can't be the same way on this. Representative Miller passed out a letter addressed to Representative Cobb (Exhibit 7) and explained it to the committee. He urged the committee to pass this bill.

The hearing on House Bill 712 is closed.

CONSIDERATION OF HB 778: Representative Gary Spaeth is the sponsor of this bill. He told the committee that this measure does one thing, it changes how an attorney is paid in a workers' compensation case--it changes it from a contingency fee to an hourly cost, an actual cost basis. The law that you see before you was passed in 1973 and that was interpreted to allow for actual costs to be given to attorneys. A recent court case, I believe in 1983 changed that to allow for contingent fees. The person that we are most concerned with under workers' compensation is the person that is injured. That person was provided for for approximately

10 years under this measure until the recent Supreme Court case without any adverse effects. This bill just asks that it return to that prior situation and eliminate contingent fees. I am a proponent of the contingent fee in many instances, but in this instance, I don't think this is a viable way to go because it increases costs to the carriers and to the state.

PROPONENTS: Norm Grosfield, representing himself as drafter of the bill, supports this bill. Mr. Grosfield said that he drafted this bill because workers' compensation is becoming extremely costly and shortly it is going to become unaffordable. He said this is one measure that will at least help correct that problem. Mr. Grosfield explained the old laws to the committee. He said that pre-1973 laws worked. The attorney would submit to the court the number of hours he had incurred, and it would be assessed against the insurance carrier if the insurance carrier had improperly denied benefits, or had improperly terminated benefits. This worked well for 10 years and in 1983 the Supreme Court decided that the system could not be utilized that way. The fee assessed against the insurance carrier had to be based on the contingency fee. I'm merely trying to reinstate the system that existed beforehand. Mr. Grosfield said that you will hear the opponents argue that if you do this, it will take away the contingency fee concept. It does not do that, it specifically allows the contingency fee to continue. The only thing is if the insurance company is assessed a certain amount and the attorney feels that he is still entitled to an additional amount, that will come out of the claimant. You will also hear that this will dry up attorney representation. That is not true. In some instances, this bill will assist the representation of injured workers because it will allow an attorney to be properly compensated in small cases. Mr. Grosfield asked the question, would this help premiums. He felt it would because in large cases there would not be as much of an assessment against the insurance carrier. The only person that will be hurt in the passage of these bills will be the trial lawyer if the trial lawyer does not feel he has been recompensed.

Keith Olson, Executive Director, Montana Logging Association, supports this bill. Mr. Olson feels that it is time to restate that Montana's workers' compensation laws exist for the employers and employees. Workers' compensation is a mandatory insurance coverage that exists to protect the workers. All others involved are subservient to the needs of the injured employee. However, Mr. Olson believes that that is not the way it is in Montana. He said Montana's system has deteriorated to the point where subordinate professions are realizing substantial and excessive

benefits far in excess of those intended when the act was created. Mr. Olson said today's workers' compensation system allows itself to be "ripped off" and that he is merely asking the legislature to eliminate that opportunity. He said Montana's system is too liberal.

George Wood, Executive Director of Montana Self-Insurers' Ass'n. rises in support of this bill.

Irv Dellinger, representing Montana Building Material Dealers Association, supports this bill.

Roger McGlenn, Executive Director of the Independent Insurance Agents of Montana, supports this bill.

Riley John, representing Professional Insurance Agents of Montana, supports this bill.

George Allen, representing Montana Retail Association, supports this bill.

OPPONENTS: Terry Trieweiler, Montana Trial Lawyers Association, opposes this bill. Mr. Trieweiler said they rise to oppose this bill not because it adversely affects attorneys, because it doesn't, but because it adversely affects workers who need attorneys. Everyone recognizes that the only way an injured worker can hire an attorney is with the contingency fee. They are out of a job, their disability benefits have been denied and they cannot afford to hire an attorney on an hourly basis. This bill doesn't preclude injured workers from hiring an attorney based on a contingency fee payment. What it does is say that even if the injured worker has to go out and hire an attorney, and even if he only has to hire him because his disability payments have been wrongfully terminated, he is only entitled to be compensated for his attorneys fees up to a certain extent, and to the extent that the contingency fee exceeds the hourly rate, he has to pay those benefits out of his own pocket. Mr. Trieweiler then explained the contingency fee agreement and how it is regulated by the Workers' Compensation Division. Mr. Trieweiler said the insurer already has total control over whether the worker needs an attorney in the first place. Secondly, the contingent fee is regulated by the division according to the amount of the percentage that can be charged. He then listed the percentages that can be charged. Mr. Trieweiler said those percentages were implemented back in 1975 after input from insurers, from workers, from the division and from self-employed industry, such as the logging industry. Everyone conceded that we needed this in order for injured workers to have representation.

(Exhibit 8)

Dick Bottomly rose to oppose HB778. He felt that there had been too much injured workers' legislation. He said the greed of the insurance company is insatiable. He cautioned the legislature to be careful in making changes in the Workers' Compensation Act. Mr. Bottomly believes that this is a complicated piece of legislation that belongs with the Governor's Blue Ribbon Insurance Company Committee. He went on to give the background on the bill. Mr. Bottomly feels that the contingent fee system is honorable and equitable. He said it is the poor man's key to the courthouse. He told about all the people that agreed to the rule that is now in place.

Don Judge, Montana State AFL-CIO, opposes this bill. Mr. Judge said he was there to discuss problems with HB 778 that deals with an injured worker. As an example, the elimination of settlements as a justification of the payment of attorneys by insurance companies forces the claimants to go to court to find the insurer responsible for attorneys' fees. Now, on a small claim settlement it would be impossible to find an attorney to handle that case. This is unfair. Mr. Judge felt there should be a fiscal note for this bill because once the workers are told how the system is going to work, they are going to say, take it to court, take it to court, don't settle out with the insurer because it comes out of my pocket and I'm an injured worker. Therefore, we would have to hire two or three more workers comp court judges because that's the only way these cases are going to get taken care of. Most injured workers cannot afford to hire an attorney by the hour. Mr. Judge asked that unless they want to amend this bill tremendously, they give it a do not pass.

Jim D. Moore, Attorney from Kalispell, Montana, opposes this bill. Mr. Moore entered testimony attached hereto marked Exhibit 9. Mr. Moore basically said all the things that the previous opponents had said.

John Hoyt rose in opposition to this bill. He said all lawyers were not equal. He said there were good lawyers and there were poor lawyers and all lawyers getting the same fee did not set well with him. Mr. Hoyt said he does not keep these kinds of records and he is not going to keep these kinds of records, and he has not sent a bill out to a client in 25 years. Mr. Hoyt said this bill says he has to keep all those records, and he replies, "give me a break."

Judge Reardon said that he was not really an opponent of the bill. He said in reading section 2 he wanted to point out what he thought was a potential problem with the bill. He said the hourly fee that the judge sets must be based on customary and current hourly fee recognized by the legal profession as a reasonable hourly fee for legal work performed in the state. I don't know what that means. There are about 2,000 members of the Montana Bar and I don't think any of them agree on what a reasonable hourly rate is, so I think you are asking me to undertake an impossible task. He feels this legislation would cause him to have many hearings as to what a reasonable hourly fee should be.

Gary Blewett, Administrator, Workers' Compensation Division of the Department of Labor and Industry, said he is not an opponent or a proponent. He said he was simply here to furnish information. He has some misgivings similar to Judge Reardon's. He drew the committee's attention to page 3, lines 3 through 7 and read from the bill. Mr. Blewett told the committee about the problems with this section of the bill. He said that this refers to another section of law (Exhibit 10) and he passed it out. He told the committee that he would not read through that law, but he can show them the effect of that if they will turn to the very last page of that handout entitled Effect of HB 778. Mr. Blewett explained this very thoroughly to the committee. Mr. Blewett said that under both the present rule and the proposed rule, the claimant could end up paying out of his own pocket and the chart shows how much.

QUESTIONS OF THE COMMITTEE: Senator Mazurek asked Representative Spaeth if he would concede under Mr. Hoyt's argument that there ought to be a contingent fee, assuming that we would consider this bill favorably, a different fee allowed for someone of Mr. Hoyt's experience than there would be for someone just graduated from law school. Representative Spaeth felt that that is exactly what the bill says. He does not see this as being a problem. He thinks it should be recognized.

CLOSING STATEMENT: Representative Spaeth said that they had accurately predicted the arguments of the opponents. He said that this bill did not have all the smoke screen in it that they see. He feels that this bill is using extreme caution as one of the opponents warned. He feels that it is up to the legislature to address this problem and not the Supreme Court. He said this bill returns the statute to what it was for ten years. Representative Spaeth said they now have ten years experience as to how this should be administered under the present situation. He said he is not against contingent fees, he simply feels that this is not the place where contingent fees should be applied.

The hearing on HB 778 is closed.

CONSIDERATION OF HB 363: Representative Robert Marks is the sponsor of this bill. There are really four parts to HB 363 as it would limit punitive damages. First, the plaintiff would have to prove the element for punitive damage by clear and convincing evidence. The plaintiff may not present the position that the defendant may have, that is his financial statement or his net worth, unless the judge rules outside the hearing of the jury, that the plaintiff has proved a prima facia claim for punitive damages. The third component is that the defendant is guilty of oppression if he intentionally causes cruel and unjust hardship by misuse or abuse of authority or power, or taking advantage of some weakness, disability or misfortune of another person, which is the Supreme Court language. The fourth part of this bill that is distinctive is that punitive damages may not be awarded to a plaintiff in the amount in excess of $500,000. That's basically the bill. I would ask that you would amend the bill, however, and I have given those amendments to the secretary and I think she has distributed them along with a narrative (Exhibit 11). Representative Marks then went through the amendments with the committee. The amendments are underlined in the narrative.

PROPONENTS: Sam Ryan, Helena, Supervisory Committee Chairman, Tri-Valley Credit Union, East Helena, supports this bill. We had an employee discharged for good cause and he was awarded an undeserved cash settlement. Thank you.

Jim Jones, Attorney from Billings, supports this bill. Mr. Jones supports putting a "cap" on punitive damages because he believes they are being abused by the legal profession. Mr. Jones said that people who believe they have done nothing wrong and that they have acted in good faith cannot afford to go to court because there is no limit or standards that are meaningful, and there is no limit on the amount of recoverable damages. Mr. Jones went over many areas that were covered by Representative Marks. Mr. Jones recommended that the committee use the language "beyond a reasonable doubt," and he felt that this was not a Constitutional question, and that the legislature had full power to do this. Mr. Jones agreed with the amendments. Mr. Jones said he had some problem with presumed malice and felt it had to be defined. He said no bank or financial institution could foreclose on any mortgage or collect any debt without violating that standard. He said you know it is going to hurt that other person, and when you do so intentionally, you violate this standard. Mr. Jones thinks it should be taken out completely.

Mike Rice, President Transystems, Inc., of Great Falls, supports this bill because of the risk of a loss. He feels they have had

NAME: TERRY TRIEWEILER DATE: 3/18/85

ADDRESS: 233 2nd ST., WHITEFISH

PHONE: 862 4597

REPRESENTING WHOM? MTLA

APPEARING ON WHICH PROPOSAL: HB 778

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? ✓

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 8
DATE 031885
BILL NO. HB 778

NAME: James D Droeve DATE: 3-18-85

ADDRESS: Box 1198, Kalispell

PHONE: 755-8020

REPRESENTING WHOM?

APPEARING ON WHICH PROPOSAL: HB 778

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS: The injured workman, by passage of this bill, would suffer yet an additional reduction of already Sub-Subsistance benefits.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
DATE 031885
BILL NO. HB 778

Permanent v. temporary disability. Where employer-insurer neither denied liability for claim nor terminated benefits, although it disputed claimant's contention of permanent total disability and paid benefits on temporary total disability, this section rather than 39-71-611 governed attorney fees when trial court adjudged claimant permanently totally disabled. *Krause v. Sears, Roebuck & Co.*, ____ Mont. ____, 641 P.2d 458, 39 St. Rep. 394 (1982).

Net compensation not to be reduced. Since the purpose of this section is to provide to a successful claimant attorney fees above and beyond the compensation awarded to him, the Workers' Compensation Judge may not assess him for those fees. *Holton v. F. H. Stoltze Land & Lumber Co.*, 195 Mont. 263, 637 P.2d 10 (1981).

Collateral references: *Grosfield*, § 10.34; *Larson*, § 83.12.

39-71-613. Regulation of attorneys' fees — forfeiture of fee for noncompliance. (1) When an attorney represents or acts on behalf of a claimant or any other party on any workers' compensation claim, the attorney shall submit to the division a contract of employment stating specifically the terms of the fee arrangement between the attorney and the claimant.

(2) The administrator of the division may regulate the amount of the attorney's fee in any workers' compensation case. In regulating the amount of the fee, the administrator shall consider the time the attorney was required to spend on the case, the complexity of the case, and any other relevant matter the administrator may consider appropriate.

(3) If an attorney violates a provision of this section, a rule adopted under this section, or an order fixing attorney's fee under this section, he shall forfeit the right to any fee which he may have collected or been entitled to collect.

History: En. 92-619 by Sec. 1, Ch. 402, L. 1975; R.C.M. 1947, 92-619.

Cross-References
"Division" defined, 39-71-116.
"Order" defined, 39-71-116.

Division note: This section was implemented in ARM 24.29.3801.

Constitutional. Statute is not an unconstitutional intrusion into the judicial branch of state government under separation of powers precedents, nor does it infringe upon Supreme Court's powers to supervise attorney conduct under Art. VII, § 2 (3) of the Montana Constitution. *Kelleher v. Division of Workers' Compensation*, W.C.Ct. Doc. No. 1269, no. 8 (v. I, 1981).

Filing of fee agreement. In the absence of a statute or rule governing the time for filing a fee agreement, there is no forfeiture of a claim for attorneys' fees if the agreement is not filed prior to the hearing before the Workers' Compensation Court. *Hock v. Lienco Cedar Products*, ____ Mont. ____, 634 P.2d 1174, 38 St. Rep. 1598 (1981).

Collateral references: *Grosfield*, § 8.50; *Larson*, § 83.13.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 10
DATE 031885
BILL NO. HB 778

BEFORE THE WORKERS' COMPENSATION DIVISION
OF THE STATE OF MONTANA

In the matter of the amendment of rule 24.29.3801.	)))	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULE 24.29.3801.

TO: All Interested Persons.

The notice of proposed division action published in the Montana Administrative Register on December 13, 1984, at page 1795, is amended as follows because the division has received a request for a public hearing from the Yellowstone Valley Claimants' Attorneys' Association, comprised of about forty members.

1. On April 4, 1985, at 10:00 a.m., a public hearing will be held in the conference room on the third floor of the Workers' Compensation Building located at 5 South Last Chance Gulch, Helena, Montana, to consider the proposed amendment of Rule 24.29.3801, Attorney Fee Regulation. The rule proposed for amendment is found on page 24-2353 of the Administrative Rules of Montana.

3. The amendment is proposed for the purpose of setting forth the manner in which attorneys, who represent or act on behalf of a claimant or any other party on any workers' compensation claim, submit to the division a contract of employment between the attorney and the claimant, and setting forth the manner in which the administrator of the division regulates the amount of the attorney's fee in any workers' compensation case. The amendment of this rule is necessary to distinguish the division's responsibility to regulate attorney fees pursuant to section 39-71-613, MCA, and the workers' compensation court's responsibility to award attorney fees pursuant to section 39-71-611, or 39-71-612, MCA.

4. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to William R. Palmer, Assistant Administrator, Workers' Compensation Division, 5 South Last Chance Gulch, Helena, Montana 59601, no later than April 19, 1985.

5. William R. Palmer, Assistant Administrator, Workers' Compensation Division, 5 South Last Chance Gulch, Helena, Montana 59601, has been designated to preside over and conduct the hearing.

5. The authority of the division to make the proposed amendment is based on section 39-71-203, MCA, and the rule implements sections 39-71-611, 39-71-612, and 39-71-613, MCA.

Gary L. Blewett

GARY L. BLEWETT, Administrator

CERTIFIED TO THE SECRETARY OF STATE: February 15, 1985

MAR Notice No. 24-29-5

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 10
DATE 031885
BILL NO. HB 778

BEFORE THE WORKERS' COMPENSATION DIVISION
OF THE STATE OF MONTANA

In the matter of the amendment of rules.	)	NOTICE OF PROPOSED AMENDMENT OF RULE 24.29.3801. (No Public Hearing Contemplated)

TO: All Interested Persons

1. On January 14, 1985, the Workers' Compensation Division proposes to amend its rule concerning attorney fee regulation and the submission of attorney fee contracts.

2. The proposed rule to be amended provides as follows:

24.29.3801 ATTORNEY FEE REGULATION (1) An attorney representing a claimant on a workers' compensation claim shall submit to the division, in accordance with section 39-71-613 MCA, a contract or a copy of a contract of employment stating specifically the terms of the fee arrangement. The contract of employment shall be signed by the claimant and the attorney~~.~~, and must be approved by the Administrator of the Division of Workers' Compensation. A contract complying with these rules shall be deemed approved by the Administrator unless good cause requires otherwise. The Administrator shall notify the attorney in writing of any contracts which do not comply with these rules.

(2) An attorney representing a claimant on a workers' compensation claim, and who plans to utilize a contingent fee system to establish the fee arrangement with the claimant, may not charge ~~a fee above the following amounts:~~

~~(a)~~ For cases that have not gone to a hearing before the workers' compensation judge, a fee above twenty-five percent (25%) of the amount of compensation payments the claimant receives due to the efforts of the attorney.

~~(b) For cases that go to a hearing before the workers' compensation judge, thirty-three percent (33%) of the amount of compensation payments the claimant receives from an order of the workers' compensation judge.~~

~~(c) For cases that are appealed to the Montana supreme court, forty percent (40%) of the amount of compensation payments the claimant receives based on the order of the supreme court.~~

(3) The amount of medical and hospital benefits received by the claimant shall not be considered in calculating the fee, unless the workers' compensation insurer has denied all liability, including medical and hospital benefits, in the claimant's case, or unless the insurer has denied the payment of certain medical and hospital costs and the attorney has been successful in obtaining such benefits for the claimant.

MAR Notice No. 24-29-4

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 10
DATE 031885
BILL NO. HB 778

(4) For good cause shown, the division may allow contingent fees in excess of the maximum fees as set forth in the above schedule. Such a variation from the maximum contingent fee schedule must be approved by the division before a final fee contract is entered into between the attorney and the claimant.

(5) The fee schedule set forth above does not preclude the use of other attorney fee arrangements, such as the use of a fee system based on time. When such a fee arrangement is utilized, the contract of employment shall specifically set forth the fee arrangement, such as the amount charged per hour.

(6) The contingent fee schedule set forth above is a maximum schedule, and nothing prevents an attorney from charging a contingent fee below the maximum contingent fee schedule. The division encourages attorneys to review each workers' compensation claim on a case by case basis in order to determine an appropriate fee. An attorney may also reduce the attorney's fee from what was originally estabished in the fee contract, without the approval of the division.

(7) ~~The division retains its authority to regulate the attorney fee amount in any workers' compensation case even though the contract of employment fully complies with the rules set forth above.~~ Attorneys' compensation in claims settled prior to the hearing of a petition before the workers' compensation court shall be determined solely by the approved fee arrangement and shall be paid out of the funds received in settlement or other funds available to the claimant. Upon the occurrence of a hearing before the workers' compensation court, that court shall have exclusive jurisdiction for the award of attorney's fees on the claim.

(8) In the event a dispute arises between any claimant and an attorney relative to attorney's fees in a workers' compensation claim not having gone to hearing on a petition before the workers' compensation court, the Administrator, upon request of either the claimant o the attorney, shall review the matter and issue his order resolving the dispute pursuant to procedures set forth in Section 24.29.201, et seq., ARM. The fee contract between attorney and client shall clearly identify the rights granted by this subsection.

(9) This rule constitutes the administrator's regulation of the amount of attorney's fees in any workers' compensation case as permitted by section 39-71-613, MCA.

3. The rationale for amending ARM 24.29.3801 is to set forth the manner in which attorneys, who represent or act on behalf of a claimant or any other party on any workers' compensation claim, submit to the division a contract of employment between the attorney and the claimant, and to set forth the manner in which the administrator of the division regulates the amount of the attorney's fee in any workers' compensation case. The amendment of this rule is necessary to distinguish the division's responsibility to regulate attorney

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 10
DATE 031885
BILL NO. HB 778

fees pursuant to section 39-71-613, MCA, and the workers' compensation court's responsibility to award attorney fees pursuant to section 39-71-611, or 39-71-612, MCA.

4. Interested parties may submit their data, views or arguments concerning these changes in writing to William R. Palmer, Assistant Administrator, Workers' Compensation Division, 5 South Last Chance Gulch, Helena, Montana 59601, by January 11, 1985.

5. If a person who is directly affected by the proposed amendment wishes to express data, views and arguments orally or in writing at a public hearing, they must make a written request for a hearing and submit this request along with any written comments to William R. Palmer, address above, no later than January 11, 1985.

6. If the division receives requests for a public hearing on the proposed amendment from 25 persons who are directly affected by the proposed amendment or ten percent of the population of the state of Montana, from the Administrative Code Committee of the legislature, from a governmental subdivision or agency, or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. The rule will affect each individual in the state. Notice of hearing will be published in the Montana Administrative Register.

GARY L. BLEWETT, Administrator

CERTIFIED TO THE SECRETARY OF STATE: December 3, 1984
(date)

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 10
DATE 031885
BILL NO. HB 778

EFFECT OF HB 778
With Division Contingent Fee Agreement Rule

Flat 25%

Example #1:
$5,0000 Case
20 hours atty. time @$100/hr.

	Effect with Current Division Rule				Effect with Proposed Division Rule			
	Contingent Agreement	Attorney Receives	Insurer Pays	Claimant Pays	Contingent Agreement	Attorney Receives	Insurer Pays	Claimant Pays
OUT OF COURT SETTLEMENT	$2,500	$2,500	-0-	$2,500	$2,500	$2,500	-0-	$2,500
W.C. COURT DECISION IN CLAIMANT'S FAVOR 33	$3,300	$3,300	$2,000	$1,300	$2,500	$2,500	$2,000	$ 500
SUPREME COURT DECISION IN CLAIMANT'S FAVOR 40	$4,000	$4,000	$2,000	$2,000	$2,500	$2,500	$2,000	$ 500

Example #2:
$10,0000 Case
40 hours atty. time @$100/hr.

	Effect with Current Division Rule				Effect with Proposed Division Rule			
	Contingent Agreement	Attorney Receives	Insurer Pays	Claimant Pays	Contingent Agreement	Attorney Receives	Insurer Pays	Claimant Pays
OUT OF COURT SETTLEMENT	$2,500	$2,500	-0-	$2,500	$2,500	$2,500	-0-	$2,500
W.C. COURT DECISION IN CLAIMANT'S FAVOR	$3,300	$4,000	$4,000	$ -0-	$2,500	$4,000	$4,000	$ -0-
SUPREME COURT DECISION IN CLAIMANT'S FAVOR	$4,000	$4,000	$4,000	$ -0-	$2,500	$4,000	$4,000	$ -0-

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 10
DATE 031885
BILL NO. HB 778

Galt explained the problem is the one who forgets there is even a record of it. Senator Mazurek stated we made a civil penalty not criminal. Senator Shaw stated he doesn't think what has been suggested will work. Senator Mazurek stated this would give you as the landowner the ability to give a lessee notice and tell him if he doesn't take his lease off the record, you will go to the county attorney, at which time he may become criminally liable. Senator Crippen moved HB 840 be recommended BE NOT CONCURRED IN. The motion failed with Senators Brown, Galt, Pinsoneault, Shaw, and Yellowtail voting in opposition. Senator Pinsoneault moved HB 840 be recommended BE CONCURRED IN. The motion carried with Senators Blaylock, Crippen, and Mazurek voting in opposition.

ACTION ON HB 529: Senator Mazurek stated we presently have an uninsured employers fund which is insolvent. This would give employees benefits in case an employer is uninsured. It is a real problem. Senator Pinsoneault moved HB 529 be recommended BE CONCURRED IN. The motion carried with Senator Shaw voting in opposition.

TABLING OF HB 778: Senator Pinsoneault moved HB 778 be recommended BE NOT CONCURRED IN. Senator Mazurek spoke against the motion. He stated the only problem he has with the bill is you still allow a contingency fee and it comes out of the claimant's share. What they are trying to do is reasonable. In workers' compensation cases, you seldom fight over liability; you fight over what the claimant is entitled to. Part of the reason for this is attorneys' fees are paid on a net recovery basis over and above what the employee receives as benefits. What this bill says is the attorney gets his reasonable rate of compensation over and above the benefits. Senator Brown moved as a substitute motion that HB 778 be recommended BE CONCURRED IN. Senator Mazurek stated there was a concern about the language on page 2, lines 20-23. Senator Daniels reminded the committee about Judge Reardon's testimony on that matter. Senator Towe asked what the purpose of the bill was and asked what we gained from it. Senator Mazurek responded fees being charged on a compensation basis as opposed to a contingency fee. Senator Towe stated it appears the only question is whether fees should be on a contingency fee basis or on an hourly fee basis. Senator Blaylock stated if we have this, it seems that when an injured employee goes to an attorney and asks what he will get charged, the attorney will have to be honest and say he is going to charge him on an hourly basis, and he charges such and such an hour. Without this bill, the attorney won't have to do that. Senator Mazurek stated there is a fee agreement that you get 25%, 33%, or 40% of the net recovery depending on how far the case goes. Everyone uses the same fee agreement. He suggested that in workers' compensation cases, generally speaking, the only dispute is how much money the claimant will get, because there are very few defenses. What he is saying is he is not trying to deprive any attorney of a reasonable fee for services rendered. If an attorney spends 100 hours, he ought to get paid for 100

hours, but if he spends two hours, he ought not to get 33% of a recovery. Senator Crippen asked who paid if the employee loses. Senator Towe stated, as a practical matter, almost all attorneys' fee agreements on workers' compensation cases will be contingency fees. The result is the claimant will end up with less money with this bill. Senator Mazurek stated he doesn't think most lawyers, if they were paid a reasonable rate, would ding the claimant for more fees. Senator Towe stated if you signed an agreement with the client that you are going to get 25%, the client is going to have to pay. Instead of the insurance company paying all of it, the client will have to pick up the rest. Senator Blaylock asked if this bill gave the injured workman better protection. Norm Grosfield stated this bill is an attempt to change a supreme court decision that changed a system that existed for 10 years prior thereto. Mr. Grosfield wanted to reinstate that system. The insurance company has to pay in accordance with a contingency fee. He always accepted the fee the court granted, and he didn't charge any additional amount against the client. His concern is workers' compensation is getting so expensive. The client generally isn't going to get hurt. Karl Englund, Montana Trial Lawyers Association, stated the committee should look at the removal of the word "settlement." This bill says the only time you are entitled to attorneys' fees is if you go to trial. The problem is what Senator Crippen started to get to, which is the contingency agreement can result in the lawyer's getting a larger amount. The supreme court recognizes that, but those settlements offset the ones he loses, in which situation he gets no money. Whether some attorneys will take from their clients or not, he cannot address, because all attorneys do that individually. He believes there is ample room in the Wight case to review the fees; there is a list of criteria to be used. Senator Shaw asked if this would give the uninsured workers' compensation fund some money. Gary Blewett responded he believes it would save the workers' compensation insurance fund money because the amount of fee the insurance fund would have to pay the attorney would be less. He was concerned as well that there was an amount the client will have to pay. He has a rule change in the offing that will reduce the maximum that will be charged. The combination of that rule and this bill would significantly reduce the amount of payment by the client. He doesn't think the claimant should have high costs of paying an attorney for assistance. Senator Brown moved as a substitute motion that HB 778 be amended as follows:

1. Page 2, line 18.
Following: "shall"
Strike: "determine a reasonable attorney fee and"

2. Page 2, line 21.
Following: "on"
Strike: "a"
Insert: "the attorney's"
Following: "fee"
Strike: remainder of line 21 through "fee" on line 22

The motion carried with Senator Daniels voting in opposition. Senator Daniels stated that is one of the things Judge Reardon was complaining about. He will spend as much time on that matter as on the claim. Mr. Grosfield stated the reference to settlement means nothing, because in order to get an award of attorneys' fees against the carrier, the case has to go to court and there must be litigation. The court has so ruled. Senator Towe asked if by taking it out you encourage the insurance company to say you are not entitled to attorneys' fees. Senator Mazurek responded they would then be liable to penalties.. Senator Brown moved HB 778 be recommended BE CONCURRED IN AS AMENDED. The motion failed with Senators Crippen, Daniels, Pinsoneault, Towe, and Yellowtail voting in opposition. Senator Pinsoneault moved HB 778 be recommended BE NOT CONCURRED IN AS AMENDED. The motion failed with Senators Blaylock, Brown, Galt, Mazurek, and Shaw voting in opposition. Senator Crippen moved HB 778 be TABLED. The motion carried with Senators Blaylock, Brown, Galt, and Mazurek voting in opposition.

FURTHER CONSIDERATION OF HB 363: Proposed amendments from Representative Bob Marks were distributed to the committee (Exhibit 1). Mr. Petesch explained the first amendment defines clear and convincing evidence. The second defines presumed malice in a manner similar to SB 200. The fourth amendment changes the amount which may be assessed. Senator Towe asked where they came up with the clear and convincing definition. Mr. Petesch stated he is not aware of any place that exists where clear and convincing evidence is defined, although there is a U.S. Supreme Court case that talks about clear and convincing evidence which is similar to this. Senator Towe pointed out the definition of presumed malice does not have the qualification "or reason to believe." Senator Pinsoneault stated defining clear and convincing raises an almost beyond-a-reasonable-doubt standard. He has no problem with that, but by defining clear and convincing is almost beyond a reasonable doubt. Bob James stated that definition is from a case in Michigan. Senator Towe moved HB 363 be amended as follows:

Page 1, line 10.
Following: line 9.
Insert: "NEW SECTION. Section 1. Purpose. The purpose of 27-1-221 is to deter claims for punitive or exemplary damages that are not clearly based in fact and, to that end, the

2. Page 2, lines 15 through 17.
Following: "common" on line 15
Strike: remainder of line 15 through "relationship" on line 17

Mr. Petesch pointed out a child is not included in SB 449. The motion to amend carried unanimously. Senator Mazurek pointed out Mr. Petesch mentioned intimidation. Section 201 is assault, 202 is aggravated assault, and 203 is intimidation. Senator Towe stated all the bill says is the officer has to file a written report. Senator Mazurek stated section 1 defines when he can make an arrest and defines domestic violence. Mr. Petesch explained for warrantless arrests in the home, the committee inserted language that a call to a police officer constituted exigent circumstances for making the arrest. Senator Towe moved the bill be amended as follows:

Page 2, line 5.
Following: "arrest."
Insert: "A summons of a peace officer to a place of residence by a family or household member constitutes an exigent circumstance for making an arrest."

The motion carried unanimously. Senator Towe moved HB 793 be recommended BE CONCURRED IN AS AMENDED. The motion carried unanimously.

ACTION ON HB 778: Senator Brown moved HB 778 be taken from the table. He explained the timber industry in his part of the state is paying through the nose for trial attorneys in situations like this. The system seemed to work well before the White case. People got by, and fees were less. Senator Towe commented that assumes the employees were made whole by that situation. It worked well because the people who were injured didn't get as much compensation. Senator Mazurek responded we negotiate fees with the claimant's attorney in virtually every case he handles. We are not changing the net recovery. The attorney gets his money over and above what the claimant recovers. Senator Towe inquired how you address the problem of the claimant who comes to an attorney and signs a contingency fee agreement. That agreement is submitted to the Workers' Compensation Division and approved. That is a valid, binding obligation on all parties. The claimant then gets a recovery. The attorney wants his percentage. The insurance company says he is not entitled to that much. He questioned who got stuck for the other money. Senator Mazurek replied no one. The attorney will take the money which he has agreed is his reasonable hourly rate, if this is a case where there is a serious question of liability. The motion to remove the bill from the table carried with Senators Towe and Yellowtail voting in opposition. Senator Towe then commented you are saying the attorneys, out of the goodness of their hearts, won't take

that money. Senator Mazurek responded you are applying the law as it exists now to what it would be under this bill. He doesn't think lawyers will use a contingency fee agreement in compensation cases like they have in the past. Senator Towe then questioned what might happen if you lose the case. Senator Shaw moved HB 778 be recommended BE CONCURRED IN AS AMENDED. The motion carried (see roll call vote attached as Exhibit 10).

FURTHER CONSIDERATION OF HB 353: Senator Brown moved HB 353 be removed from the table. Senator Mazurek pointed out it was tabled because if a person went in to commit a crime, you might as well not have burglary, because burglary is going into the house of another for committing an offense. Aggravated burglary is you intended to commit a felony. You eliminate one. Senator Blaylock asked why would we need to have aggravated burglary if you have burglary. Senator Mazurek responded we have burglary. This says if you went in to commit an offense, you have burglary. Sections 1 and 2 read essentially identically. Senator Brown pointed out subsections (a) and (b) qualify that he has to be armed. Mr. Petesch pointed out a weapon, as you remember from previous bills, can be anything. The motion to remove the bill from the table failed on a tie vote (see roll call vote attached as Exhibit 11).

FURTHER CONSIDERATION OF HBs 438-447: Mr. Petesch explained the federal law requires the state to have a support withholding procedure up to a maximum allowance. It requires that withholding has to be given priority. They require a determination of paternity at any time. They add tax refund deductions and liens against real or personal property. They require those, but they need not be used or applied when the state determines they would not be necessary to carry out the federal act. Senator Towe asked if the state makes a policy decision and they are not necessary to carry out the federal act, would they be necessary here? Mr. Petesch responded it says you need procedures, but they need not be used or applied in cases where the state determines so. It appears to be an administrative decision. Senator Towe suggested adding language to that effect at the end of these bills, which language would be referred to as the caveat insertion to be prepared by Mr. Petesch.

ACTION ON HB 438: Senator Daniels raised a question about a joint return and what would be done in a remarriage situation where the husband owes child support. The department said the existing practice was to amend the return to determine if the wife were entitled to half of the refund. Senator Brown moved HB 438 be recommended BE CONCURRED IN. Senator Mazurek asked why the parties couldn't make a reasonable effort to agree. You can't require them to file separately, because that will have an impact on the amount of the refund. Chairman Mazurek pointed out Dennis Shober, Child Support Enforcement Bureau; Bill

STANDING COMMITTEE REPORT

March 28 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration HOUSE BILL No. 773

third reading copy (blue color)

(Senator Mazurek)

REVISE ATTORNEY FEE PROVISIONS OF WORKERS' COMPENSATION ACT

Respectfully report as follows: That HOUSE BILL No. 773

be amended as follows:

1. Page 2, line 18.
Following: "shall"
Strike: "determine a reasonable attorney fee and"

2. Page 2, line 21.
Following: "on"
Strike: "a"
Insert: "the attorney's"
Following: "fee"
Strike: remainder of line 21 through "fee" on line 22

AND AS AMENDED

BE CONCURRED IN

~~DO PASS~~

~~DO NOT PASS~~

Senator Joe Mazurek Chairman.